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Case No. 83-490

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

RALPH DAVIS, individually, CHESTER BLAKEMORE, officially as the Director of the Department of Highway Safety and Motor Vehicles; and J. ELDREDGE BEACH, individually and as Director of the Florida Highway Patrol, Department of Highway Safety and Motor Vehicles,

Appellants,

v.

GREGORY SCOTT SCHERER,

Appellee.

ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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INTRODUCTION

Three erroneous assumptions which misstate either the applicable law, the facts, or both form the basis of Appellee's Motion to Dismiss or Affirm. Appellants' response to these three points of error are made in the order they were raised in Appellee's Motion.

1. Appellants' Mootness Argument Was Presented to Both the Trial Court and the Appellate Court.

Appellee's assertion that Appellants' have not raised the issue of mootness (see Appellants' Jurisdictional Statement, pp. 13-16) prior to their brief in this Court, is wrong. Such argument was presented to both the trial court and to the appellate court. The issue was raised in the trial court via Defendants' Motion to Alter Judgment. As a result of such motion, the trial court receded from its original Memorandum and Opinion Order (see,

Appellants' Appendix to Jurisdictional Statement, hereinafter "Appendix", pp. la-55a) and found that declaratory relief was inappropriate because certain statutory deficiences had been corrected. The trial court did not, however, correct its ruling on the post-termination issue.

Thereafter, Appellants again raised the mootness issue in their brief to the Eleventh Circuit Court of Appeals. See, Brief of Appellants, United States Court of Appeals, Eleventh Circuit, pp. 33-39. Appellee tacitly recognizes this in his quotation of footnote 13 of Appellants' Eleventh Circuit brief.

Further, Appellee's argument that Appellants have somehow waived their entitlement to address the mootness issue here because they previously noted the similar wording of the two statutes in question in a footnote is without merit.

This Court must look to the statute in effect at the time of Appellee's termination. Because that statute is undisputedly no longer in effect, any argument as to its constitutionality or applicability is moot, and the trial court's declaratory judgment as to that later-enacted statute is clear error.

Further, contrary to Appellee's assertion, the evidence did not demonstrate that the length of time which elapsed between Appellee's discharge and his hearing was constitutionally infirm. Time periods longer than or close to that experienced by Appellee have been found constitutional. See, Thompson v. Bass, 616 F.2d 1259 (5th Cir. 1980), cert. den., 449 U.S. 983 (1980); Ciechon v. City of Chicago, 634 F.2d 1055 (7th Cir. 1980); Alsbury v. United States Post Office, 530 F.2d 852 (9th Cir. 1976), cert. den., 429

U.S. 828 (1977); Blackford v. Maryland Automobile Insurance Fund, 532 F.Supp. 24 D. Md. 1981).

2. Appellants Have Correctly Interpreted Harlow v. Fitzgerald.

Appellee argues that Appellants' interpretation of Harlow v. Fitzgerald, ___ U.S. ___, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) is "narrow" or "strained". However, Harlow clearly states that the objective test to be utilized in determining good faith immunity is framed solely in terms of whether clearly established constitutional law has been violated. Harlow, ___ U.S. ___, 102 S.Ct. 2727, 73 L.Ed.2d at 410-411.

It is true that the lower court cases Appellants cite do not revolve around a violation of state law or mere agency rule. That is because the courts looked only to see if clearly established

constitutional law had been violated. That determination alone resulted in the granting or denial of good faith immunity, since that is the standard established by this Court.

Appellee cites Smith v. Wade, ___ U.S. ___, 51 U.S.L.W. 4407 (April 20, 1983), in support of his expansive interpretation of Harlow. Smith v. Wade involved the harrassment, beating, and sexual assault of a youthful offender by other inmates. The legal issue there was whether punitive damages were appropriately assessed under 42 U.S.C. §1983. This Court held that punitive damages could be assessed "when the defendant's conduct is shown to be motivated by evil motive or intent or when it involves reckless or callous indifference to the federally protected rights of others." ___ U.S. ___, 51 U.S.L.W. at 4414.

Smith v. Wade is clearly inapposite to the instant case. There was no factual finding of evil intent or reckless conduct here which might arguably abrogate immunity. Similarly, Clark v. Taylor, 710 F.2d 4 (1st Cir. 1983), citing Smith v. Wade, relies upon a finding of reckless and callous indifference. Here, the trial court explicitly declined to award punitive damages stating:

> These damages should not be considered PUNITIVE damages, which would have been awarded if the defendants' actions demonstrated malicious intention.

Appendix, p. 54a.

Even if Appellants exceeded their sphere of administrative discretion, which Appellants insist they did not,[1] this is not

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[1] Appellee states twice in his Motion (pp. 4, 9) that Appellants violated their disciplinary guidelines. However, this is a blantant misstatement. The trial court's Order Amending Judgment states: "The (cont'd on next page)

equivalent to reckless misconduct, nor is it sufficient to abrogate immunity.

Williams v. Treen, 671 F.2d 892 (5th Cir. 1982), cert. den., 103 S.Ct. 762 (1983), also relied upon by Appellee to support his interpretation of Harlow, found that a violation of state law abrogated good faith immunity. However, the state law violated, which dealt with prison conditions, was the same as the federal constitutional right prohibiting such conditions. And even the Williams court recognized that "a §1983 plaintiff must allege a deprivation of a federally protected right in order to set forth a prima facie case . . . ." Williams at 900. The same is true in King v. Higgins, 702 F.2d 18 (1st Cir. 1983), where the

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conclusion defendants violated departmental guidelines is not supported by the evidence . . . ." Appendix, p. 72a.

court noted that the basic standards of due process had long been established under federal law.

Thus, Appellants' reading of Harlow to require a violation of federal constitutional law before good faith immunity is abrogated is unchanged by the cases upon which Appellee relies. None of those cases change or modify this Court's opinion in Harlow, and even to the extent they do, Harlow must prevail.

3. This Court Has Jurisdiction to Consider the Good Faith Immunity Issue.

The jurisdiction of this Court on appeal may be narrow, but it is not as narrow as Appellee suggests. The applicable language found in 28 U.S.C. §1254(2) states that appeals may be reviewed by the Court:

> by a party relying on a state statute held by a court of appeals to be invalid as repugnant to the Constitutional, treaties, or laws

> of the United States, . . . and the review on appeal shall be restricted to the Federal questions presented. (Emphasis added).

The plain language of the statute permits appeals of "Federal questions." There can be no doubt that the issue of good faith immunity is a federal question. Thus, jurisdiction has been properly invoked.

CONCLUSION

The reasons for this Court to note probable jurisdiction, delinated in Appellants' Jurisdictional Statement, have not been rebutted by Appellee. Therefore, this Court should note probable jurisdiction of this appeal.

Respectfully submitted

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief in Opposition to Motion to Dismiss or Affirm has been furnished by United States Mail to BEN R. PATTERSON, Counsel for Appellee, 1215 Thomasville Road, Post Office Box 4289, Tallahassee, Florida 32303, this 31st day of October, 1983.

Bruce A. Minnick

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